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International and EU law in (post-)conflict states: any lessons for Ukraine?

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1 Introduction

In the very first line of his classic novel *Anna Karenina*, great Leo Tolstoy wrote that '[h]appy families are all alike; every unhappy family is unhappy in its own way'. In the same manner, one could say that all countries living in peace are all alike, whereas every country that goes through a war is tragic in its own way.

Currently ongoing war in Ukraine is one of its kind. Perhaps it is unfair to compare it to armed conflicts that happened elsewhere throughout the history. And importantly, it is still *current* and *ongoing*. So, many comparisons and accounts will inevitably be speculative.

Nonetheless, after seeing and reading what was going on in Ukraine since February 2022, many were reminded of the tragedies of the Yugoslav wars that occurred in the territories of Croatia, Bosnia and Herzegovina, Serbia, and Kosovo during the 1990s.[2] The siege of Kiev in the first part of the Russian invasion was compared to the siege of Sarajevo, which lasted from 1992 to 1995. Massacre in Bucha was compared to the killings of captured civilians and prisoners of war in Vukovar in 1991. And the faith of Mariupol was compared to the faith of Srebrenica, where genocide was committed in 1995.

For scholars and students of law, parallels with the Yugoslav wars provide opportunities for thinking about what the role of (international and EU) law in the war in Ukraine is or could/should be. In this brief contribution, I offer several thoughts on those matters.

2 International law

Following the collapse of communism, former socialist Yugoslav federation disintegrated in a stream of violent conflicts between or within the newly independent states. From the very beginning, what we know as the 'international community' responded differently from how it responded to the war in Ukraine, not only regarding the 2022 invasion but also with the 2014 events (Russian annexation of Crimea and attempted secession of eastern regions of Donetsk and Luhansk).

First and very obvious thing was that the UN Security Council was operative. Since none of the 'permanent five' members of the Security Council were directly involved in the Yugoslav conflicts, some important resolutions could be passed. They, for instance, introduced arms embargoes, instituted no-fly zones,

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[2] Cf Bruno Tertrais and Loïc Tregoures, 'From Sarajevo to Mariupol: what the Yugoslav Wars can teach us about Ukraine's fate' (*Institut Montaigne*, 21 April 2022) <https://www.institutmontaigne.org/en/blog/sarajevo-mariupol-what-yugoslav-wars-can-teach-us-about-ukraines-fate>.

established peacekeeping forces, etc. Unlike today, when the Security Council is effectively in a deadlock, given that Russia can veto every proposal.

Despite the Security Council authorising certain actions, war crimes and crimes against humanity could not be fully prevented. At different points in time, the UN peacekeeping missions were deployed in different parts of the former Yugoslavia; while in Bosnia, the UN even designated several 'safe areas'. But these missions and mandates were understaffed, underfunded, underequipped, and eventually poorly executed. Peacekeepers were lightly armed and could not stand against the local armies and militias. In fact, there was hardly any *peace* to *keep*. The UN troops thus failed to enforce their mandate to keep the 'safe areas' safe.[3] So, although some action by the UN is better than the UN's complete inaction, the Yugoslav experience shows that it can hardly ever be a complete success story. Which led to events like in Srebrenica, where Bosnian Serb forces committed genocide against local Bosniak ie Muslim population before the eyes of paralysed UN troops.

That genocide happened in Srebrenica was confirmed in several judgments of the International Criminal Tribunal for former Yugoslavia (ICTY).[4] This tribunal was also established by the resolution of the Security Council. To have a similar tribunal that would deal with the violations of international humanitarian and criminal law in Ukraine is at this point difficult, even impossible to imagine.

Nevertheless, despite the existence of judgments of international tribunals confirming the occurrence of genocide, it is disputed until today by smaller or larger parts of the society in Serbia and Bosnia. In particular, some Bosnian Serb leaders and Serbian politicians keep denying that genocide in Srebrenica ever happened.[5] For them, the ICTY (and arguably the ICJ too) is a political court, biased against their ethnic group. Therefore, its decisions are discarded as partisan and illegitimate. So, despite having a number of final decisions delivered by international tribunals, there is still no one, shared version of history. International law is regularly disputed and manipulated. And although international institutions were more responsive and functional than in the case of Ukraine, it is questionable whether or how much they have contributed to transitional justice in these countries and dealing with the history of the Yugoslav wars.

Current Russian leadership and President Putin are likewise manipulating and abusing international law to show that their invasion of Ukraine is somehow justified. On the one hand, they are toying with the notion of genocide, alleging that Ukrainian government has been perpetrating it in the Eastern Ukraine against Russophone population, and using as a pretext for the invasion. On the other hand, Russian government is

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[3] Cf Yasushi Akashi, 'The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate' (1995) 19 Fordham International Law Journal 312.

[4] See ICTY, *Prosecutor v Krstić*, Case No IT-98-33-A (Appeal Judgment, 19 April 2004); ICTY, *Prosecutor v Popović*, Case No IT-05-88-A (Appeal Judgment, 30 January 2015); and ICTY, *Prosecutor v Tolimir*, Case No IT-05-88/2-A (Appeal Judgment, 8 April 2015). The International Court of Justice (ICJ) likewise found that genocide in Srebrenica occurred; see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 2007 ICJ 140 (26 February 2007). In this case, the ICJ held that Serbia did not commit genocide nor was complicit in its perpetration, but it ruled that Serbia did breach the Genocide Convention by failing to prevent the genocide and punish its perpetrators.

[5] Although some of them do admit that mass killing of Bosniak civilians did occur in Srebrenica. So, *actus reus* can be established, and what happened in Srebrenica could be qualified as a war crime. But absent *mens rea* (or genocidal intent), it cannot be qualified as genocide. Others still allege that the number of killed persons is fabricated or even completely made up.

trying to justify their intervention in Ukraine by presenting it as being the same as NATO military interventions, especially in Serbia in 1999, which were conducted without the Security Council's authorisation.

At the same time, Russia ignores the ICJ's order by which it is asked to 'immediately suspend the military operations' in Ukraine, in the ongoing case brought by Ukraine under the Genocide Convention.[6] This again merely shows the inherent fragility of the institutional system set up under international law, which is primarily related to weak or inexistent enforcement mechanisms.

3 EU law

As disintegration of Yugoslavia was looming, then-European Community was actively engaged in trying to prevent the armed conflict from escalating. To that end, one of the offered 'carrots' was a fast-track membership, complemented by a package of substantial financial assistance, as some contemporaries have recalled.[7] But nationalist leaders that won the first democratic elections in the two biggest federal republics, Croatia and Serbia, rejected the offer, since their countries were already in an open confrontation.

Thirty years from that, the situation has changed. Now it is Ukraine who is asking for a fast-track accession to the EU. Some Member States of the EU are in favour of letting Ukraine in quickly. Others are more cautious, with some concerns about the consequences of such a move.

The accession process is meant to fully prepare a candidate country for the membership in the Union. It has different stages, and it takes a lot of time to get through all of them. The EU has adopted the so-called Copenhagen accession criteria that every candidate has to satisfy before being admitted.[8] They are divided into three different categories, namely legal/political,[9] economic,[10] and administrative criteria.[11] Member States must unanimously agree that every step in the accession negotiations was successfully completed by a candidate country.

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[6] See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia)*, Order on provisional measures (16 March 2022).

[7] As recounted by Kiro Gligorov (first president of (now North) Macedonia, one of the newly independent Yugoslav republics), in late May 1991 the European 'troika' comprised of Jacques Delors (President of the European Commission), Jacques Santer (Prime Minister of Luxembourg, which held a rotating presidency of the Council at the time), and Hans van den Broek (Dutch Minister of Foreign Affairs, country that was about to take over the Council's presidency) met with Yugoslav leaders and declared political willingness to support an immediate accession of Yugoslavia to the European Community, and to invest $4.5 billion in the country's economic reforms. See Andera Bekić, 'London i Bonn – dva pola politike Europske zajednice prema priznanju Republike Hrvatske 1991. godine' (2010) 42 Časopis za suvremenu povijest 339, 346–347.

[8] See European Commission, 'Enlargement – Accession criteria' <https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/accession-criteria_en>.

[9] They concern 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'; see ibid.

[10] They concern 'a functioning market economy and the capacity to cope with competition and market forces'; see ibid.

[11] They concern 'administrative and institutional capacity to effectively implement the *acquis* and ability to take on the obligations of membership'; see ibid.

For some of the Western Balkans countries, the EU has developed additional special criteria. The most important concerned the requirement of cooperation with the ICTY. This criterion was the key point on the agenda of the EU accession process for Croatia, Bosnia and Herzegovina, and Serbia since the early 2000s. It was tailor-made for these post-conflict societies. Its main rationale was to contribute to reconciliation and transitional justice, and by extension to democratisation and stabilisation of these countries.[12] But how effectively, if at all, the application of this condition contributed to these goals remains questionable. It seems certain that it failed to ensure genuine reconciliation in the region. In Bosnia, every other year there are talks about secession and new armed conflict.[13] The High Representative for Bosnia and Herzegovina regularly complains about the threats to peace and security in Bosnia in his annual reports on the implementation of the Dayton Peace Accords to the UN Security Council.[14] The fear of a war and breakup is even greater in the wake of Russian invasion of Ukraine, given the Russian interest and recent meddling in Bosnia.[15]

Of countries that saw the most violent conflicts during the Yugoslav wars, only Croatia managed to join the EU. This happened in 2013. Serbia and Montenegro are candidates for a decade now, yet both saw a limited progress in accession negotiations. Bosnia and Herzegovina and Kosovo are still only potential candidates, but each of them has specific difficulties with their contested statehood.

The EU's side of equation struggles with the credibility of membership offer and coherence and consistency in the application of pre-accession conditionality. 'Enlargement fatigue' and 'absorption capacity' are phrases that usually get repeated to explain the Union's half-hearted engagement with the countries of the Western Balkans that remain outside the EU.

The same concerns could burden the Union's engagement with Ukraine. Ukrainian government has already submitted a bid to join the EU in a special accelerated procedure.[16] Heads of EU states and governments afterwards invited the European Commission to prepare an opinion – so-called 'avis' – on this bid, in which the Commission should evaluate how prepared Ukraine is to open negotiations.[17]

Getting an instant candidate status will probably not be an issue. As commentators noted, although '[t]here is no fast-track for reaching full membership', 'a "fast start" is feasible and absolutely required' option.[18] But under existing arrangements, this merely launches a painstaking process of negotiations and reforms to satisfy the Copenhagen criteria. Absent meaningful reforms of the standard accession procedure, it seems

[12] Iavor Rangelov, 'A Regional Approach to Justice? Rethinking EU Justice Policies in Conflict and Transition' (European Policy Centre 2011).
[13] 'Bosnia is on the brink of falling apart again' (*The Economist*, 12 February 2022) <https://www.economist.com/europe/2022/02/12/bosnia-is-on-the-brink-of-falling-apart-again>.
[14] Office of the High Representative, 'HR's Reports' <http://www.ohr.int/cat/hrs-reports/>.
[15] 'Is Bosnia on the brink of a civil war?' (*The Week*, 14 April 2022) <https://www.theweek.co.uk/news/world-news/europe/954657/could-war-return-to-europe-bosnia>.
[16] Alexandra Brzozowski, 'Ukraine requests EU membership under fast-track procedure' (*EURACTIV*, 1 March 2022).
[17] Michael Emerson, Steven Blockmans, Veronika Movchan and Artem Remizov, 'Opinion on Ukraine's application for membership of the European Union' (2022) *Centre for European Policy Studies, Policy Insights No 2022-16*.
[18] ibid 13.

illusory that a country in the midst of invasion could realistically work on the reforms that the Commission will be requiring.

There was also some discussion of an example of instant EU membership that happened virtually overnight, although rarely we think about it as a classical enlargement – the reunification of Germany.[19] In 1990, Eastern Germany (DDR) united with the Federal Republic of Germany. In essence, one until then independent country united with an EU Member State, without much talk or accession negotiations.

But there existed an enormous historical momentum, following the fall of the Berlin wall and the perceived and of the Cold war. And there was political will and preparedness in the EU, especially on the part of the biggest members of the bloc, to bear all the costs of that 'enlargement' and not to hold it back. In what has become an urban myth, France agreed to everything only after Germany accepted to give up its Deutschmark and support the introduction of common currency (euro).[20]

So, fast-track membership may not be impossible after all. The only question is whether there is a will to bear all kinds of costs that would come with such a move in the case of Ukraine, or with reform of the existing accession procedure that would introduce, say, conditional or gradual membership or some other special status. These costs would be not only financial and economic, but also of political and security and demographic nature. At least some Member States from the EU's 'core' seem hesitant to go into that direction.

Whether in the near future Ukraine gets a regular candidate status or preferential accession treatment or even fact-track membership depends exclusively on the EU itself. But decision-making process in the EU is not a simple matter. Its key institutional actors may not speak with one voice, and they usually do not when it comes to the enlargement. The European Parliament is mostly like 'let's go', since it sits on the sidelines and only gives its consent. It is primarily concerned with values, so it can afford to be enthusiastic and ambitious. The European Commission is typically like 'all in good time', since it is in charge of running the entire business: leading the negotiations, screening and monitoring the candidates, etc. It is primarily concerns with technicalities, and needs to be diligent, mindful, and thorough. And the Council is almost always like 'hold on', since Member States need to reach unanimity on any accession bid, and there are always doubtful ones. It is mostly concerned with national interests, so it can appear incoherent and inconsistent.

The cards being dealt this way, it becomes apparent that Ukrainian future in the EU is primarily about politics, not about law. The main provision of the Treaties – Article 49 TEU – is sufficiently open-textured and malleable. It does not prevent any of the abovementioned options. Inability of twenty-seven Member States to agree and find a political will is the only real obstacle.[21] Looking back at the German reunification,

[19] Georgi Gotev, 'The Brief – Is instant EU membership possible?' (*EURACTIV*, 3 March 2022) <https://www.euractiv.com/section/europe-s-east/opinion/the-brief-is-instant-eu-membership-possible/>.
[20] Michael Sauga, Stefan Simons and Klaus Wiegrefe, 'Was the Deutsche Mark Sacrificed for Reunification?' (*Der Spiegel*, 30 September 2010) <https://www.spiegel.de/international/germany/the-price-of-unity-was-the-deutsche-mark-sacrificed-for-reunification-a-719940.html>.
[21] Dimitry V Kochenov and Ronald Janse, 'Admitting Ukraine to the EU: Article 49 TEU is the "Special Procedure"' (*EU Law Live*, 30 March 2022) <https://eulawlive.com/op-ed-admitting-ukraine-to-the-eu-article-49-teu-is-the-special-procedure-by-dimitry-kochenov-and-ronald-janse/>.

the only question is whether the war in Ukraine is special and historic enough to warrant a special approach. Some think it is;[22] but then again, such an appraisal seems possible only from a sufficient distance in time.

4 Concluding remarks

This brief comparison between the current situation in Ukraine and what happened before and after the Yugoslav wars leads me to the following two thoughts.

First, when guns go loud, law becomes silent. In war, the law as we know it – be it international or municipal – reaches its limits. In this state of exception, institutions and rules of law lose much of its effectiveness. The superstructure of law collapses. In its rubbles, one can discern politics. And at its base squats the bare power.

Second, EU integration started off like a peace project. Commitment to and maintenance of the peace is arguably the core fabric of the Union's political and moral identity. Nevertheless, the EU was less successful in preserving the peace at its borders. And once those conflicts were done, it was also not completely successful in assisting those neighbours, now candidate countries, in democratic transition and state-building, in preparation for the accession. The EU enlargement policy for these post-conflict states introduced national identity- and sovereignty-sensitive criteria, like requirement for Serbia and Kosovo to reach a deal on the latter's status. Insistence on these criteria and their inconsistent application can create backlash.[23] Imagine Ukrainian leaders being pressured to make hard compromises over the Crimean Peninsula, or the status of eastern regions of Donetsk and Luhansk, or integration of the separatists' structures in the system of governance. Not an easy thing to do right now. Moreover, the experience of some Western Balkans countries shows that the progress on the accession path is reversible. Pushing back too hard against statehood, ethno-national identities, and war memories can strengthen radical nationalist and anti-EU politics; consequently, enthusiasm for accession disappears.

Ukraine will hopefully soon become one of these *post-conflict* states. When and in what shape and form is anyone's guess. Once we learn what happens, much of the things we are discussing and writing about now will make more sense. Until that day comes, but also in everything that will follow in Eastern Europe, what the EU says and does will define what the EU is.

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[22] Dimitry V Kochenov, 'Take Down the Wall. And Make Russia Pay for It: The Case for the Immediate Accession of Ukraine to the European Union' (*Verfassungsblog*, 21 March 2022) <https://verfassungsblog.de/take-down-the-wall-and-make-russia-pay-for-it/>.

[23] I discussed this in an earlier paper; see Davor Petrić, 'EU Pre-Accession Political Requirements for Western Balkans: Unravelling the Application and Compliance Record of the ICTY Conditionality' (2016) 2 European studies 115.

Commentary Series (Ukraine Special Collection)

Assembling the pieces: the accountability puzzle for international crimes in Ukraine

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The response from the international community to the Russian invasion of Ukraine has been unprecedented: a myriad of measures has been taken to express condemnation of Putin's so-called 'special military operation'; to establish the illegality of the invasion under international law; and, of great importance to many Ukrainians,[25] in the pursuit of accountability for international crimes which have been committed. To the latter end, a number of actors on the international and national levels are working tirelessly to document and gather evidence of such crimes occurring in Ukraine, and several accountability avenues are being pursued. Questions however remain: are the accountability mechanisms being pursued sufficient, or do gaps remain; what are the implications of the proliferation of involved actors and mechanisms; and who bears ultimate responsibility when it comes to pursuing accountability?

Fuelled by intense media coverage of the conflict and international outrage, the response from the International Criminal Court to the invasion was unparalleled. On 28 February, the ICC Prosecutor, Karim Khan QC, announced that he would be seeking authorisation to open an investigation into the situation in Ukraine, on the basis of the December 2020 conclusions of the Office of the Prosecutor's preliminary examination.[26] The investigation was opened on 2 March 2022, following the referral by 39 Member States,[27] and covers any allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards. The ICC is, however, not a panacea. Firstly, the crime of aggression cannot currently be investigated by the ICC with regards to the Ukrainian situation, as Russia is not a State Party to the Rome Statute, and the UN Security Council has not, and is unlikely to refer the situation. It could potentially prosecute war crimes and crimes against humanity in this situation however, secondly, the ICC operates under a principle of complementarity: it only steps in when the relevant States are unwilling or unable to do so. Moreover, the ICC would only aim to try perpetrators most responsible for international crimes. Thirdly, ICC trials are lengthy, complex and expensive, and fourthly, Russia refuses to cooperate with the ICC, meaning that there is an enforceability gap.

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[25] *See e.g.* Maksym Vishchyk, 'Insight from Ukraine: Revitalizing Belief in International Law', Just Security, 18 March 2022, online at https://www.justsecurity.org/80719/insight-from-ukraine-revitalizing-belief-in-international-law/ (accessed 4 May 2022).
[26] It is worth noting that Ukraine accepted the jurisdiction of the ICC by declarations under Article 12 (3) of the Rome Statute giving the ICC jurisdiction over crimes perpetrated in the territory of Ukraine from November 2013 onward.
[27] Note that further States have referred the situation, including Japan, since. *See* e.g. 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine', 11 March 2022, online at https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and (accessed 4 May 2022).

A number of other accountability mechanisms have also been tabled. A group of high-profile legal and political actors have called for a Nuremberg-style special tribunal for the punishment of crime of aggression in Ukraine to be created which is complementary to other accountability mechanisms.[28] Although supported by Ukrainian officials, the suggestion of a Special Tribunal has been met with criticism. As Kevin Jon Heller argues, in a similar way to the ICC, without regime change in Russia, it is unlikely that Russia would cooperate with such a Special Tribunal, and indeed if regime change did occur, Russia could either ratify the Rome Statute (again) or try perpetrators itself domestically and a special tribunal would be redundant.[29] Although the creation of such a tribunal could send a powerful symbolic message, without Russian cooperation, there is also a risk that perpetrators would never be tried in person, and also even if they could be, they may enjoy immunity *rationale personae*, which could turn the tribunal into a symbol of Russian impunity instead.[30] Such a Special Tribunal would again be expensive to fund, and may also suffer from questionable legitimacy, given that it would be established by countries such as the UK and US, who pressed for the exclusion of non-State parties from the crime of aggression at the ICC, and the leaders of which are argued by many to have committed this crime themselves in the context of the invasion of Iraq.[31]

Accountability also does not only need to be pursued on an international level. In fact, several European countries have initiated universal jurisdiction investigations, including Poland, Germany, Spain, Estonia, Lithuania, Slovakia, France, Norway, Latvia, Sweden and Switzerland.[32] While universal jurisdiction prosecutions could serve as 'gap-fillers' where justice cannot be reached at an international level, the provisions of each state which may allow for prosecution of perpetrators vary, and in some cases are open to interpretation.[33] Not all of these states have universal jurisdiction over the crime of aggression, immunities mean that these states may only be able to try lower-level perpetrators, and in many cases universal jurisdiction provisions require the presence of the accused in the prosecuting state.[34] Convictions may therefore only be 'symbolic'.[35]

One problematic aspect of the initiatives described above is the centring of the West in the pursuit of accountability. This relates to 'whataboutism' or 'why not us' arguments, in that the Western willingness in supporting Ukraine disregards other ongoing conflicts, and also the idea of 'West(s)plaining': the 'phenomenon of people from the Anglosphere loudly foisting their analytical schema and political

[28] 'Statement calling for the creation of a special tribunal for the punishment of the crime of aggression against Ukraine', issued on 4 March 2022, oline at https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf.
[29] Kevin Jon Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea', *Opinio Juris*, 7 March 2022, online at https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/ (accessed on 4 May 2022).
[30] Ibid.
[31] Ibid.
[32] Annegret Hartig, ''Domestic Criminal Courts as Gap-Fillers? Avoiding Impunity for the Commission of the Crime of Aggression against Ukraine', *Völkerrechtsblog*, 12 April 2022, online at https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/ (accessed on 4 May 2022).
[33] Ibid.
[34] Ibid.
[35] Witold Zonte, 'Can Putin Be Tried in Poland?', *Verfassungsblog*, 20 April 2022, online at https://verfassungsblog.de/can-putin-be-tried-in-poland/(accessed on 4 May 2022).

prescriptions onto the [Eastern European] region.'[36] In the accountability sphere, careful attention must be given to 'the standpoint of those doing the condemning' or pursuing accountability for at least two reasons.[37] Firstly, because of the potential for bias and hypocrisy[38] alluded to briefly above: that Western states are only willing to prosecute violations of international law committed by those they oppose, but not their own (and also when it suits them, if we consider that the situations in Crimea, Donetsk and Luhansk have been largely ignored since 2014). Another example of such selective practices is the sudden increase of voluntary donations by certain State parties to support the ICC's investigations in Ukraine.[39] Secondly, because a Western-centric or Euro-centric version of accountability negates other perspectives, in this case Eastern European understanding. The Western willingness to assist 'others'[40] (or, another interpretation, the placing of the burden on the West to intervene in not only the Ukrainian situation, but *all* conflicts) only reinforces colonial narratives and international (criminal) law's politics of selectivity. In this sense, the role of Ukraine itself in pursuing accountability warrants our undivided attention.

Prior to the invasion, many conflict-related crimes had been charged domestically in Ukraine either as terrorism offences or as ordinary crimes, which did not adequately reflect the gravity or context of the offences. There had been some progress: Ukraine had taken steps to align its domestic law and framework with international criminal law standards, with the adoption of Bill 2689 (which still however needs Presidential approval), and the creation of a War Crimes Unit and investigative units, and had seen three conflict-related crimes convictions under Article 438 of its Criminal Code ("violations of the laws and customs of war"). Since the invasion, the Prosecutor General, Irina Venediktova, and the Office of the Prosecutor General (OPG) have demonstrated a willingness to actively investigate and prosecute crimes.[41] Given that the OPG are already dealing with over 11,000 registered crimes,[42] capacity-building of investigators, prosecutors and other criminal justice actors in Ukraine remains imperative,[43] and it is encouraging that Ukrainian actors are open to advice and assistance from international counterparts.[44] In

[36] Patryk I. Labuda, 'On Eastern Europe, 'Whataboutism' and 'West(s)plaining': Some Thoughts on International Lawyers' Responses to Ukraine', *EJIL:Talk!,* 12 April 2022, oline at https://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/, referencing Jan Smoleński and Jan Dutkiewicz, 'The American Pundits Who Can't Resist "Westsplaining" Ukraine', *The Soapbox*, 4 March 2022, oline at https://newrepublic.com/article/165603/carlson-russia-ukraine-imperialism-nato (accessed 4 May 2022).

[37] Ralph Wilde, 'Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting', *Opinio Juris*, 17 March 2022, online at http://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/ (accessed on 4 May 2022).

[38] Ibid.

[39] Mark Kersten, 'Should the ICC accept Western funding for its probe in Ukraine?', Al Jazeera, 7 April 2022, online at https://www.aljazeera.com/opinions/2022/4/7/should-the-icc-accept-western-funding-for-its-probe-in-ukraine (accessed 4 May 2022).

[40] Labuda (n 36).

[41] See https://twitter.com/GP_Ukraine (accessed 4 May 2022).

[42] https://twitter.com/GP_Ukraine/status/1518843962349572096?s=20&t=V-ELwbklxWYfnDaTkl4GPw Note that this figure represents crimes occurring since the "full-scale invasion" only, and does not include crimes which occurred before 24 February 2022, meaning that the figure is likely to be considerably higher.

[43] The T.M.C. Asser Instituut and Global Rights Compliance have been working on a partnered project entitled 'Strengthening Ukraine's Capacity to Investigate and Prosecute International Crimes' since 2020, which is funded by the Netherlands Ministry of Foreign Affairs. See https://www.asser.nl/matra-ukraine/

[44] See, e.g. https://twitter.com/VenediktovaIV/status/1517472127527571456?s=20&t=V-ELwbklxWYfnDaTkl4GPw and Doughty Street Chambers, 'Government of Ukraine Announces the Creation of a

early April, President Zelensky announced that he had approved a decision to create a 'special mechanism of justice in Ukraine' which is intended to be 'the joint work of national and international experts: investigators, prosecutors and judges.' No further details have been provided about the mechanism, although some are speculating a court similar to the War Crimes Chamber in Bosnia and Herzegovina.[45]

Regardless of in which forum(s) perpetrators will be brought to justice, widespread documentation of crimes, and the collection and preservation of evidence has already commenced. An initial team of ICC investigators was sent to Ukraine on 3 March 2022, an online portal for submitting evidence was launched on 11 March 2022,[46] and Karim Khan QC has personally visited Ukraine with the aim of ensuring cooperation between Ukrainian and ICC investigations.[47] A joint investigation team between Ukraine, Lithuania, Poland and the Office of the Prosecutor at the ICC has been set up with the support of Eurojust.[48] A number of open-source investigators, international and national civil society organisations (CSOs) are also documenting and verifying reports of violations of IHL and ICL with a view to feeding this into future accountability mechanisms.[49] The United Nations Human Rights Council has also adopted an Independent International Commission of Inquiry on Ukraine.[50]

With a proliferation of mechanisms available which each have merits, gaps, and which may or may not complement each other, and with overwhelming amounts of documentation, much of which may not be of a standard admissible in future proceedings, the picture is complex. Questions of coordination and over-documention are of ongoing relevance. The centralisation of evidence collection, documentation and storage could be an option, but immediately raises concerns about the who, when, where, and how. The 'who' question is an especially delicate one in light of the earlier discussed worrisome power dynamics and the Western oriented, funded, and controlled accountability initiatives. Centralised control over evidence and accountability can be convenient but will inevitably also cause the exclusion of certain voices and initiatives.

Legal Task Force on Accountability for Crimes Committed in Ukraine', 29 March 2022, online at https://www.doughtystreet.co.uk/news/government-ukraine-announces-creation-legal-task-force-accountability-crimes-committed-ukraine (accessed 4 May 2022).

[45] Kathryn Allinson and Lawrence Hill-Cawthorne, 'Ukraine: Zelensky's 'special mechanism' for prosecuting war crimes explained', The Conversation, 11 April 2022, online at https://theconversation.com/ukraine-zelenskys-special-mechanism-for-prosecuting-war-crimes-explained-180902 (accessed 4 May 2022).

[46] 'Statement of ICC Prosecutor' (n 3).

[47] 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on his visits to Ukraine and Poland: "Engagement with all actors critical for effective, independent investigations."', 16 March 2022, online at https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-his-visits-ukraine-and-poland-engagement-all-actors (accessed on 4 May 2022)

[48] Eurojust, 'ICC participates in joint investigation team supported by Eurojust on alleged core international crimes in Ukraine', Press release, 22 April 2022, online at https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes (accessed 4 May 2022).

[49] See, e.g. Zmina, 'Ukraine. 5 AM Coalition devoted to documenting war crimes is launched in Ukraine', 15 March 2022, online at https://zmina.ua/en/event-en/ukraine-5-am-coalition-devoted-to-documenting-war-crimes-is-launched-in-ukraine/ (accessed 4 May 2022); Bellingcat, 'Ukraine', multiple entries, online at https://www.bellingcat.com/tag/ukraine/ (accessed 4 May 2022).

[50] UNHRC, 'Independent International Commission of Inquiry on Ukraine', online at https://www.ohchr.org/en/hr-bodies/hrc/iicihr-ukraine/index (accessed 4 May 2022).

With this short contribution we do not aim to provide solutions, but rather to provide an exposé of the proliferating initiatives with a view to flagging some of the questions that arise when pursuing accountability for international crimes committed in the context of the war in Ukraine. We emphasise the importance of continuing reflection on the long-term implications of ad-hoc actions and call for the inclusion and amplification of Ukrainian voices in the international legal debate.

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The Case of Ukraine v. Russian Federation before the International Court of Justice

Renske Vos[51]

What is wryly remarkable to note with regards to events in Ukraine, is how early international law caught on. On 27 February, days after Russia invaded Ukraine, President Zelensky announced -via twitter- that Ukraine had filed an application against Russia before the International Court of Justice (ICJ).[52] In an extraordinarily creative move, Ukraine turned Russian allegations of genocide around to claim jurisdiction based on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). In a further bold move, Ukraine asked the Court once there to also issue provisional measures in order to bring the conflict to a halt. Below, I will discuss each move in turn.

Jurisdiction

As the Application Instituting Proceedings submitted by Ukraine recounts, the Russian Federation memorably claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and that these alleged acts of genocide warranted the military actions subsequently undertaken by Russia against Ukraine on Ukrainian territory.[53] Hitherto this moment, international monitors have found no evidence of such genocidal acts committed by Ukraine.[54] Ukraine itself too denies that any such acts have occurred,[55] stating that "Russia's claims are baseless and absurd".[56] Ukraine does however hold that given the situation, a dispute has arisen relating to the interpretation and application of the Genocide Convention, "as Ukraine and Russia hold opposite views on whether genocide has been committed in Ukraine, and whether Article I of the Convention provides a basis for Russia to use military force against Ukraine to 'prevent and to punish' this alleged genocide."[57]

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[52] Володимир Зеленський @ZelenskyyUa, *Twitter,* 27 February 2022*,* available: https://twitter.com/ZelenskyyUa/status/1497885721931268103?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1497885721931268103%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.ejiltalk.org%2Fukraine-files-icj-claim-against-russia%2F.

[53] ICJ, 'Dispute Relating to Allegations of Genocide' (Ukraine v. Russian Federation), *Application Instituting Proceedings,* 26 February 2022, available: https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf, para 8; refers to: Address by the President of the Russian Federation of 21 February 2022, available: http://en.kremlin.ru/events/president/transcripts/statements/67828; Address by the President of the Russian Federation of 24 February 2022, available: http://en.kremlin.ru/events/president/transcripts/statements/by-date/24.02.2022; Statement and reply by Permanent Representative Vassily Nebenzia at UNSC briefing on Ukraine, 23 February 2022, available: https://russiaun.ru/en/news/230222un.

[54] NOS, 'De Russische stoelen bleven leeg bij zitting INternationaal Gerechtshof', 7 March 2022, available: https://nos.nl/collectie/13888/artikel/2420208-de-russische-stoelen-bleven-leeg-bij-zitting-internationaal-gerechtshof.

[55] ICJ, *Application Instituting Proceedings* (Ukraine v. Russian Federation)*,* para 9

[56] ICJ, *Application Instituting Proceedings* (Ukraine v. Russian Federation), para 10, refers to: Statement of the Ministry of Foreign Affairs of Ukraine on Russia's False and Offensive Allegations of Genocide As a Pretext For Its Unlawful Military Aggression, 26 February 2022, available: https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-nepravdivih-ta-obrazlivih-zvinuvachenrosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi.

[57] ICJ, *Application Instituting Proceedings* (Ukraine v. Russian Federation), para 11.

Ukraine thus makes use of the Russian allegations of genocide to declare the existence of a dispute on the matter between itself and the Russian Federation. The existence of such a dispute is crucial for a subsequent invocation of Article IX of the Genocide Convention, which in conjunction with Article 36(1) of the ICJ Statute, provides that such disputes "shall be submitted to the ICJ at the request of any of the parties to the dispute." Ukraine moreover needs to take this route via Article IX of the Genocide Convention, as Russia does not recognize the compulsory jurisdiction of the ICJ on the basis of Article 36(2) of the ICJ Statute. This means that Russia would have to consent on an ad hoc basis for a dispute to be brought to and heard by the ICJ via Article 36(1) of the ICJ Statute directly, which is politically unlikely. The Article IX Genocide Convention door is moreover open, as importantly neither Ukraine nor Russia have any reservations to this Article in place to limit the jurisdiction of the ICJ. The clever reversal of allegations and segue to the Genocide Convention by Ukraine have been greeted by commentators as "reverse compliance"[58] and as so "surprisingly-creative-it-might-actually- work".[59]

The written application filed by Ukraine subsequently makes a number of requests to the ICJ. First of all, Ukraine asks the ICJ to essentially clear its name by declaring that no acts of genocide have been committed in Luhansk and Donetsk. Secondly, Ukraine asks the ICJ to declare that given that the claims of genocide are false, they cannot form a lawful basis for Russia's military actions in or against Ukraine. Therefore, thirdly and fourthly, Ukraine asks the ICJ to declare that both the recognition of Donetsk and Luhansk as independent states, as well as the "special military operation" launched on 24 February 2022 are based on false claims of genocide and therefore have no basis in the Genocide Conventions. And so, fifthly, Ukraine requests a Russian guarantee of non-repetition of such actions, as well as, sixthly, full reparation for all damage caused.[60]

Provisional measures

ICJ international law cases are lengthy affairs, and so at the time of writing the jury is still out on the final decision in the case of Ukraine v. Russian Federation. Yet in a second clever move, Ukraine accompanied its application to the ICJ with a request for provisional measures, which were subsequently granted. The Court issued as provisional measures that: the Russian Federation shall immediately suspend military operations in the territory of Ukraine; and shall ensure that any military or irregular armed units (…) take no steps in furtherance of the military operations; and that both parties shall refrain from any action which might aggravate or extend the dispute.[61]

The ICJ has the power to indicate provisional measures under Article 41 of its Statute and Articles 73, 74, and 75 of the Rules of the Court. Such provisional measures are moreover legally binding.[62] The indication of provisional measures depends on a three-part test: the Court needs to have prima facie jurisdiction; there

[58] Deepak Raju, 'Ukraine v Russia: A "Reverse Compliance" case on Genocide', *EJIL: Talk!,* 15 March 2022, available: https://www.ejiltalk.org/ukraine-v-russia-a-reverse-compliance-case-on-genocide/.
[59] Marko Milanovic, 'Ukraine Files ICJ Claim against Russia', *EJIL: Talk!,* 27 February 2022, available: https://www.ejiltalk.org/ukraine-files-icj-claim-against-russia/.
[60] ICJ, *Application Instituting Proceedings* (Ukraine v. Russian Federation), para 30.
[61] ICJ, 'Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide' (Ukraine v. Russian Federation), *Request for the Indication of Provisional Measures,* Order of 16 March 2022, available: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf, para 86.
[62] ICJ, 'LaGrand' (Germany v. United States of America) *judgement*, 27 June 2001, available: https://www.icj-cij.org/public/files/case-related/104/104-20010627-JUD-01-00-EN.pdf, para 110.

needs to be a link between the rights whose protection is sought and the measures requested; and, there needs to be a risk of irreparable harm and urgency.[63]

In its order of provisional measures of 16 March 2022, the ICJ found that all three parts of the test were met. First, prima facie jurisdiction, entails that the ICJ should determine to have jurisdiction over the case literally 'at first sight', or on first impression. This thus entails a lower threshold for jurisdiction than is needed for the eventual decision. In the case at hand, the ICJ found sufficient elements to establish prima facie the existence of a dispute between Ukraine and the Russian Federation relating to the interpretation, application or fulfilment of the Genocide Convention.[64] Secondly, the Court also found a link between the requested provisional measures and the right claimed by Ukraine. Being: the request to suspend military actions and Ukraine's right "not to be subject to a false claim of genocide", and "not to be subject to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention".[65] Third, the Court found indeed that "any military operation, in particular one on the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment".[66]

The indication of provisional measures against Russia by the ICJ, was hailed by commentators as a "near total win for Ukraine".[67] Commentators also noted how the language of the Court in its order was "often very direct, going out of its way to make points that it was not legally required to make but were required by the necessity of the moment".[68] Yet, it has not gone unnoticed that the Russian Federation chose to remain absent from the proceedings and that it has not recognized the jurisdiction of the ICJ in the case.[69] Most notably, Russia denies that its actions fall within the scope of the Genocide Convention, including under the compromissory clause of Article IX.[70]

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[63] Art. 41 ICJ Statute and ICJ Jurisprudence, e.g. ICJ 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (The Gambia v. Myanmar), *provisional measures order,* 23 January 2020, available: https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf, para 16.
[64] ICJ, *Order of Provisional Measures* (Ukraine v. Russian Federation), para 47.
[65] ICJ, 'Request for the Indication of Provisional Measures Submitted by Ukraine' 27 February 2022, available: https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf, para 12 in: ICJ, *Order of Provisional Measures* (Ukraine v. Russian Federation), para 52.
[66] ICJ, *Order of Provisional Measures* (Ukraine v. Russian Federation), para 74.
[67] Marko Milanovic, 'ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe', *EJIL: Talk!,* 16 March 2022, available: https://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia-in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/; and "a very clear and absolute decision in Ukraine's favor" in Chimène Keitner, Zoe Tatarsky and Just Security, 'Q&A: The ICJ's Order on Provisional Measures in Ukraine v. Russian Federation', *Just Security,* 16 March 2022, available: https://www.justsecurity.org/80703/qa-icj-order-on-provisional-measures-ukraine-russia/.
[68] Ibid.
[69] Reuters, 'Russian no show at U.N. court hearing on Ukrainian 'genocide'', 7 March 2022, available: https://www.reuters.com/world/europe/ukraine-russia-face-off-world-court-over-genocide-claim-2022-03-06/; Diego Sanchez Borjas, 'The ICJ Order in Urkaine v. Russia', *Völkerrechtsblog*, 28 March 2022, available: https://voelkerrechtsblog.org/the-icj-order-in-ukraine-v-russia/.
[70] ICJ, 'Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case', 7 March 2022, available: https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf.

Concluding reflections

Given the scale and gravity of events ongoing in Ukraine, a legal case before a Court in The Hague might seem a relatively small or peripheral event. Such a view might be bolstered by a Russian refusal to observe the provisional measures. Yet there are a few points of note to observe. First, how at a time when the UN Security Council faces a deadlock in decision-making over current events in Ukraine, notably due to the Russian veto,[71] the ICJ is resorted to instead. Indeed, the message carried in the provisional measures -to suspend military actions- is likely to be similar to what the UN Security Council would have called for in a resolution, should it have been able to issue it. Such recourse to the ICJ for provisional measures moreover echoes a similar strategy to request provisional measures by The Gambia against Myanmar.[72] Second, even when provisional measures indicated by the ICJ go unobserved, such disregard does constitute a new breach of an international obligation. As such, this might moreover constitute a basis for new sanctions or countermeasures to be issued, and it might make it more difficult for third states to (continue to) support Russia. Thirdly, the ICJ remains *the* authority on pronouncing international law, and as such its order of provisional measures and its forthcoming decision on the case will be of historic importance.

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[71] UN, 'Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto' 25 February 2022, available: https://www.un.org/press/en/2022/sc14808.doc.htm.

[72] Note how incidentally, public hearings on the preliminary objections raised by Myanmar took place at the same time that Ukraine filed its application. ICJ, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) *Latest Developments,* available: https://www.icj-cij.org/en/case/178.